HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 92)(b)

Description of the case.

Criminal Appeal No. 875 of 2001

Bijendra Prasad vs State

Approved for reporting.

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~~Not approved for reporting~~

Date of decision

8-2-2005

(Rajesh Tandon J.) **(V.S. Sirpurkar C.J.)**

HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 875 of 2001
(Old No. 1344 of 1993)

Bijendra Prasad son of Sri Anandi Prasad
Resident of village Sei, Patti Kandwalsyun,
District Pauri Garhwal ..... Appellant

Versus

State ..... Opposite Party

Mr. Raman Kumar Sah, Advocate Amicus Curiae
Mr. D.K. Sharma, Government Advocate for the State

Coram: Hon'ble V.S. Sirpurkar C.J.
Hon'ble Rajesh Tandon J.

Dated: February 8, 2005

Per Hon'bel Rajesh Tandon J.

Present appeal has been filed against the judgment and order dated 6.7.1993, passed by Sri Krishan Kumar, the then Sessions Judge, Pauri Garhwal, in Sessions Trial No. 28 of 1992, convicting the accused appellant Bijendra Prasad under section 302 I.P.C. and sentencing him to undergo imprisonment for life.

2. Briefly stated the prosecution case is that complainant Ramesh Chandra Filed a report at Patwari Chawki Dhangu Malla-II, District Pauri Garhwal, alleging therein that Smt. Anita Devi was residing in the house of the complainant as

tenant with her husband Bijendnra Prasad. On 5.6.1990 at 9.00 AM she informed the complainant that her husband had murdered her 1 ½ years old son. Complainant Ramesh Chandra with the help of other villagers had caught hold the accused and tied him with a pillar. On the basis of written report, a case was registered against the accused and investigation was conducted by Sri Shiv Lal, Patwari. The Investigating Officer visited the place of occurrence and held inquest. He sent the dead body for post mortem examination. He recorded the statements of the witnesses and after completing all formalities, submitted charge sheet Ex.ka-11 against the accused appellant.

3. Accused was committed to the Court of Sessions. Charge for the offence punishable under section 302 of the Indian Penal Code was framed against him. The accused pleaded not guilty and claimed to be tried.

4. To prove its case against the accused, the prosecution has examined Dr. P.C. Fuloria, P.W.1, who conducted post mortem examination on the dead body of deceased boy Tinku on 7.6.1992 at 5.00 PM and fond the following ante mortem injuries on his body:

> Circular well defined ligature mark horizontally placed extending from the thyroid cartilage to back of neck. The mark is measuring 25 cms. X

3.5 cms. White glistening groove. Margins are showing contusion at places. On section the groove is white. Muscle at places shows haemorrhage near the margin. The thyroid cartilage is fractured. Tracheal cavity shows blood mixed with froth.

In the opinion of the doctor P.W.1 P.C. Fuloria, the death was caused due to asphyxia as a result of strangulation. The

duration of the death was shown to be at 9.00 AM on 5.6.1992. P.W1 has proved post mortem report Ex.ka-1.

P.W.2 Smt. Anita Devi, is wife of accused Bijendra Prasad. In her examination-in-chief, she has stated that the accused had another wife also who was residing at his native village. She stated that they performed love marriage and three children were got from their wedlock. Out of which, the first one had died. She has stated that the accused often used to beat her on the pretext that the boy Tinku was illegitimate child. She has narrated that on 5.6.1992 at about 9.00 AM she was in the lower storey of the house and was preparing tea and accused was on the upper storey. She gave a call to the accused for taking tea but he did not come down. Then she went up in the room and saw the accused tying a rope around the neck of Tinku due to which the boy had died. She started hue and cry due to which Ramesh Chandra and many other village people were assembled there. She narrated the entire story to the village people on which they tied the accused with

pillar and Ramesh Chandra went to Patwari Chowki to lodge the report. She proved the rope as Ex. 1.

5. P.W.3 is complainant Ramesh Chandra, has stated on oath that Anita Devi was her tenant and accused Bijendra Prasad also lived with her. On 5.6.1992, at about 10.00 AM after hearing the hue and cry of Smt. Anita, he along with Vidya Dutt and other village people went to her residence. Smt. Anita Devi told them that her husband had murdered her son Tinku by strangulation. He submitted that accused tried to run away but they caught hold of him and tied him with a pillar. He went to the Patwari Chauki and lodged report there. He proved the written report Ex.ka-2.

6. P.W.4 is Shiv Lal, Patwari, who investigated the case has stated on oath that on 5.6.1992, Ramesh Chandra submitted a written report Ex.ka-2, on the basis of which he prepared F.I,R, Ex. Ka-3 and registered the case in the G.D. the copy of which was Ex.ka-4. He went to the spot and prepared inquest report, panchayatnama and various other documents i.e. Ex. Ka-5 to Ex.ka-9. He sealed the dead body and sent the same for post mortem examination. He arrested the accused and interrogated him. After completing the investigation he submitted charge sheet Ex.ka-11 against the accused.

7. The accused in his statement under section 313 Cr.P.C. has denied the prosecution allegations. However he has admitted that he had performed love marriage with Smt. Anita but has denied that he often

used to level charges on her character and used to say that Tinku was not the legitimate child. He denied that he committed murder of Tinku by strangulation. He has stated that at the time of occurrence he came out of the bathroom and saw Ramesh and Anita sitting in the room. Both of them raised alarm that he had murdered the child and village people caught hold of him. He alleged that he has been falsely implicated in this case due to enmity. However, no evidence has been adduced in defence.

8. The learned Sessions Judge on the basis of the evidence adduced by the prosecution held the accused guilty for the offence punishable under section 302 of the India Penal Code and convicted and sentenced him to undergo imprisonment for life. Feeling aggrieved the present appeal has been filed by the accused appellant.

9. We have heard Sri Raman Sah, Advocate appearing as Amicus curiae for the accused and Sri D.K. Sharma, learned

counsel for the State and have perused the entire evidence on record.

10. The learned Session Judge has convicted the accused appellant on the basis of following evidence and circumstances:

(a) There were only two persons in the house. One Smt. Anita Devi who was the mother and another was accused Bijendra Prasad who was the father of the deceased. The defence has put suggestion to Smt. Anita

that it was she who committed the murder of Tinku. This suggestion was denied by Smt.Anita. There was only the accused Bijendra Prasad who could commit the murder and this fact has been proved by the evidence of Smt. Anita Devi.

(b) The accused was quarrelling with Smt. Anita Devi for the last five or six months. She was fed up and she to the accused that if he did not want to have relations with her, he may divorce her.

(c) It was the accused appellant Bijendra Prasad who alleged Tinku as illegitimate child and therefore, the accused had reason to get rid off Tinku and he could have reason to murder him.

(d) At the time of incident Smt. Anit Devi was crying and was stating that Bijendra Prasad committed murder. This conduct of Smt. Anita Devi was most probable and natural because when the child of a woman was murdered, she could not remain narrating the story to every body coming there, rather the most natural conduct was that she will remain crying and while crying she will narrate

about the occurrence and that actually happened in this case.

(e) After the incident the village people were afraid of the consequences and that was the reason that they caught hold off the accused and roped him with a pillar and Ramesh Chandra went to Patwari Chowki.

11. The prosecution has come up with the case that the accused appellant Bijendra Prasad had caused death of his minor son aged 1 ½ year by strangulation. To prove the cause of death of the deceased Tinku, the prosecution has examined P.W.1 Dr. P.C. Fuloria. He conducted post mortem examination on the dead body of the boy and had found ligature mark horizontally placed on the neck of the deceased. The thyroid cartilage of the deceased was fractured. In the opinion of the doctor the death of the boy was caused due to asphyxia as a result of strangulation. Thus from the medical evidence adduced by the prosecution it is proved that the death of the body was not natural and the same was caused by strangulation.

12. It has to be seen that whether the prosecution has succeeded in proving beyond all reasonable doubts that the death of the minor boy Tinku was caused by the accused appellant and none else. The entire prosecution case in this respect stands on the solitary testimony of eyewitness Smt. Anita Devi P.W.1. Smt. Anita Devi was posted as A.N.M. in P.H.C. Dadamandi and accused Bijendra Singh was also residing with her. Smt. Anita Devi has stated that she performed love marriage with the accused. In her examination in-chief this witness has stated that it was the accused person

who strangulated the boy with a rope. She states as under:

eSus eqyfte dks pk; ihus ds fy, iqdkj yxkbZ ij og uhps ugh vk;k rc eSa mij xbZ vkSj ns[kk fd eqyfte us fVadw ds xys esa jLlh dldj ck/ks gq, ns[kk og jLlh izn”kZ &1 vnkyr esa gS cPPk fVdw fd e`R;q gks x;h FkhA

In her cross- examination she has categorically stated that it was the accused Bijendra Singh who committed murder of Tinku and none else. She states as under:

eSusa visu cPps dks eqyfte }kjk ekjrs gq, vkf[kj esa ns[kk Fkk ml le; cPpk ej x;k Fkk ysfdu og ekj jgk FkkA ;g dgk xyr gS fd eqyfte ls NwV ikus ds fy, eSus cPpk [kqn ekjk gksA

13. The learned Amicus Curiae for the accused has submitted that the accused appellant has no motive to murder his own son. It is not disputed that the motive plays an important role in the case of murder. From the evidence of P.W.2 Smt. Anita the prosecution has established that the accused has motive and ill will against the deceased as he has suspicion that the boy was illegitimate child and in this regard he often used to assassinate the character of Smt. Anita. She has stated as under:

eqyfte fVadw ds ckcr dgrk Fkk fd voS/k larku gS vkSj dgrk Fkk fd eSa viuk osru mls ugh nsrh gwW A fVadw ds iSnk;”k ds ,d lky ckn eqyfte dk O;ogkj [kjkc gks x;k Dys”k djrk Fkk o eq>s ejrk ihVrk FkkA

In her cross-examination Smt. Anita has stated that there was quarrel in between her and the accused. She has stated as under:

eqyfte eq>ls esjs pfj= ds ckcr vdlj >xMrk jgrk Fkk A 5-6-1992 dks Hkh eqyfte ls dgk lquh gqabZ FkhA eqyfte dks dksbZ [kkl xqLl ml le; ugh FkkA dgklquh ? kVuk okys dejs esa gh gqbZ FkhA dgklquh 7 cts gq;h FkhA

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Eqkyfte 23-5-92 ls cjkcj esajs lkFk blh edku esa jg jgk Fkk vkSj bl nkSjku cjkcj >xMk gksrk jgrk FkkA

14. Thus from the statement of Smt. Anita it is clear that the accused had strong motive to commit murder of the boy.

15. There are other circumstances to connect the accused appellant with the guilt of murder. From the evidence of Smt. Anita and Ramesh Chandra it is clear that there were only accused and his wife Smt. Anita in the house and none else. Accused Bijendra Prasad had reason and motive to commit the murder of the boy. Smt. Anita Devi immediately after the occurrence had told regarding the occurrence to the village people. Therefore, it cannot be said that the accused was implicated falsely in the case after consultation and deliberance.

16. The learned Amius Curaie has pointed out some minor discrepancies in the statement of P.W.2 Smt. Anita Devi but these discrepancies do not help the defence in any way and her statement cannot be thrown out completely due to such discrepancies.

17. The ocular testimony of Smt. Anita P.W.2 is quite natural. She was cross-examined at length but nothing has come out to disbelieve her. Thus we find that the learned Sessions Judge was perfectly justified by placing reliance on the statement of Smt. Anita for convicting the accused appellant.

18. The learned Amicus Curiae for the accused has urged that the statement of Smt. Anita Devi was recorded by the Patwari on 16.6.92 i.e. after 10 days of the incident. However, Patwari has given explanation for this that the mental condition of Smt. Anita Devi after the murder of her son was not good. Shiv Lal, Patwari P.W.4 in his examination –in- chief has stated as under:

fnukad 16-6-92 dks vuhrk ds c;ku fy, FksA pwWfd 6-6-92 dks mlus crk;k fd esjh ekufld fLFkfr Bhd ugh gS blfy, mlds c;ku ml fnu ugh fy[ks tk ldsA

19. The reason shown by the Investigating officer for recording the statement of Smt. Anita with some delay appears to be quite natural.

20. The occurrence took place at about 9.00 AM on 5.6.1992 A perusal of the F.I.R. shows that the report was lodged in the Patwari chawki on the same day at

4.30 PM. According to F.I.R. the place of occurrence is 10 kms. Far from the Patwari Chawki, which has to be traveled on foot.

21. The learned Amicus curiae has also pointed out various discrepancies in the statement of informant Ramesh Chandra P.W.3. In his cross examination this witness has stated that he submitted written report to the Patwari at chowki but the report was not lodged by the Patwari and he came to the place of occurrence with the informant and one Sri Vidha Dutt. He has stated that another report was scribed at the place of occurrence. This witness has stated as under:

eSa o fo|knRr [kqn iVokjh ij x;sA iVokjh us mls le; ntZ ugh dh og gekjs lkFk xkWo vk;k rc fjiksVZ ntZ dh xkWo okil vkdj gh eSus fjiksVZ vfurk ds edku ij cSB dj fy[khA ml le; 2&3 vkSj iVokjh Hkh FksA xkWo ds yksx Hkh ekStwn FksA iVokjh ds ikl tc x;k Fkk rHkh fjiksVZ fy[kdj lkFk ys x;k Fkk og fjiksVZ iVokjh us okil dj nhA og eSus QkM nhA

22. The learned defence counsel has urged that this statement of the complainant himself crates shadow of doubt on the correctness of first information report.

The learned Amicus curiae has place reliance on the observations made by the Apex court in (2001) 6 SCC 181m T.T.Antony vs. State of Kerala and others. In that case the apex Court has held that after registering the F.I.R. and commencing investigation, registering of second F.I.R. or successive F.I.R.s

in respect of the same incident and crime and making of fresh investigations pursuant thereto would be irregular.

In the present case there is no allegation that after lodging first F.I.R. another F.I.R. was lodged for the same incident. This statement of P.W.3 Ramesh Chandra shows that he had torn the first written report and another report was scribed. Whatever may be the circumstance for this witness to make such an statement but merely due to such statement the entire testimony of P.W.3 Ramesh Chandra cannot be set aside. The Latin maxim *Falsus in uno, flaus in omnibus (*false in one thing, false in all) has not received general acceptance in difference jurisdiction in India, nor has this maxim come to occupy the status of a rule of law. If after consideration the whole mass of evidence, a residue of acceptable truth is established by the prosecution beyond reasonable doubt the courts are bound to give effect to the result flowing from it, and not throw it over-board on purely hypothetical and conjectural grounds. Even a sifting process to separate the chaff from the grain is permissible while evaluating the ocular evidence.

Apex Court in the case State of Punjab v. Hari Singh and another AIR 1974 SC 1168 has held as under:

"16.*As human testimony, resulting from widely different powers of observation and description, is necessarily faulty and even truthful witnesses not infrequently exaggerate or imagine or tell half truths,*

the Court must try to extract and separate the hard core of truth from the whole evidence. This is what is meant by the proverbial saying that Courts must separate "the chaff from the grain". If after considering the whole mass of evidence, a residue of acceptable truth is

established by the prosecution beyond any reasonable doubt the Court are bound to give effect to the result flowing from it and not throw it overboard on purely hypothetical and conjectural grounds."

The Apex Court in AIR 1965 SC 277 Ugar Ahir v. State of Bihar has held as under:

"6. The maxim falsus in uno, falsu in omnibus (false in one thing, false in everything) is nether a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest. That is what the courts have done in this case. In effect, the courts disbelieved practically the whole version given by the witnesses in regard to the pursuit, the assault on the deceased with lathis, the accused going on a bicycle, and the deceased wresting the

bhala from one of the appellants and attacking with the same two of the appellants, the case that the accused attacked the witnesses, and the assertion of the witnesses of their being disinterested spectators. If all this was disbelieved, what else remained? To reverse the metaphor, the courts removed the grain and accepted the chaff and convicted the appellants."

23. In the case Shakila Abdulagfar Khan v. Vsant Raghunath Dhoble 2003 SCC (Crl) 1918, the apex Court has held as under:

"It is the duty of the court to separate the grain from the chaff. Falsity of a particular material witness or a material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that is amounts to is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence."

24. In the present case there were husband and wife present in the house and the wife came out of the house making hue and cry and large number of villagers had assembled there. The wife told the village people that her husband done to death of her 1½

year old son by strangulation. P.W.3 Ramesh Chandra ahs fully corroborated the ocular testimony of eyewitness Smt. Anita. P.W.3 and merely some contradictions in his statement regarding lodging of the first information report by the Patwari and manner of investigation his entire evidence cannot be thrown aside. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments.

25. In the present case the wife of the accused and none else leveled charge of murder of his minor boy. The mother of deceased and wife of the accused has categorically stated in her

statement on oath it was accused appellant Birendra Prasad who had done to death of his minor son by strangulation. The accused cannot be spared from the clutches of law because the Patwari has not properly investigated the case or recorded the statement of P.W.2 Smt. Anita, mother of the deceased promptly or merely because there are contradictions in the statement of informant P.W.3 Ramesh Chandra.

26. In the case Miller vs. Minister of Pension, All England Law Reports 1947(2) 373 Lord Denning has observed as under:

"The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can

be dismissed with the sentence " Of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice."

27. The apex Court in a number of cases has held that the accused may be convicted even on the testimony of a solitary witness and the court is concerned with the quality and not with the quantity of the evidence.

28. In the case Karim Hussain Sohra Sindhi v. State of Gujrat 2004 SCC (Cri) 1055, the apex Court has held as under:

"This Court has held that as a general rule the court can and may act on the testimony of a single witness provided he is person on the sole testimony of a single witness. That is the logic of section 134 of the Indian Evidence Act, 1872 (in short "the Evidence Act") But, if there are doubts about the testimony the court will insist on corroboration. It is for the court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time honored principle is that evidence has to be weighed and not counted. On this principle stands the evidence of section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise."

29. The learned Sessions Judge on the basis of ocular testimony of sole eyewitness P.W.2 Smt. Anita Devi

corroborated by the post mortem examination report proved by P.W.1 Dr. P .C. Fuloriya coupled with the statements of P.W.3 Ramesh Chandra and P.W.4 Shiv Lal, Patwari Convicted and sentenced the accused appellant for the offence of murder punishable under section 302 of the Indian Penal Code. The learned Sessions Judge has rightly discarded the minor discrepancies in the statement of P.W.2 Smt. Anita and contradictions cropped up in the statement of P.W.3 Ramesh Chandra and some irregularities caused by the Investigating Officer P.W.4 Shiv Lal, Patwari. Minor irregularities in the investigation by the prosecution agency cannot be looked upon seriously in view of the observations made by the apex court in the case Zahira Habibulla H. Sheikh v. State of Gujarat (2004)4 SCC 158, the apex Court has held that the courts exist for doing justice and it is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. The apex Court has held as under:

56. *As pithily stated in Jennison v. Baker8: (All ER p. 1006d)*

> *“The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.”*

Courts have to ensure that accused persons are punished and that the might or authority of the State

are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil truing to hide the realities or covering the obvious deficiencies, courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice.

30. The Apex Court in the case State of Karnataka v. Puttaraja (2204) 1 SCC 475f has held as under:

"The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and the victim belong."

31. Thus in view of the discussion made above we are of the opinion that the Sessions Judge has rightly convicted the accused appellant for the offence punishable under section 302 of the Indian Penal Code. From the following evidence the prosecution has fully proved the guilt of the accused to commit murder of deceased Tinku:

(i) From the ocular testimony of Smt. Anita P.W.2 who is the mother of the deceased and wife of the accused, it has been proved that the accused Bijendra Prasad and none else committed the murder of minor boy Tinku.

(ii) The accused was apprehended by the village people at the place of occurrence and tied him with a pillar and the investigating officer arrested him thereafter.

(iii) The dead body of the deceased boy was also recovered from the spot.

(iv) The rope Ex. 1, with which the strangulation was made, has also been recovered from the place of occurrence.

(v) The motive of the accused for committing the crime is also fully proved by the statement of P.W.2 Smt. Anita Devi as the accused has suspicion that the deceased Tinku was illegitimate son and the also used to level charges on the character of his wife Smt. Anita.

(vi) There was quarrel in between the accused and Smt. Anita Devi on the date of occurrence and conduct of the accused is a strong circumstance goes against him.

(vii) The accused was present in the house at the time of incident but he has not taken any defense that somebody else other than him may be the author of the crime.

32. Thus the sentence of life imprisonment awarded by the Sessions Judge is also proper and no interference is required in the judgment and order passed by the Sessions Judge.

33. Consequently the appeal is dismissed.

34. Let a copy of this order be sent to be trial Court along with the original record for compliance.

(Rajesh Tandon J.) **(V.S. Sirpurkar C.J.)**

8.2.2005
*Dhyani